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3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 ANNA VALLEE SWAN,
8 Plaintiff,

9 v.

10 BANK OF AMERICA CORPORATION,
11 Defendant.
12

2:07-CV-00217-PMP-LRL

ORDER

13 Presently before the Court is Defendant Bank of America's Motion for Summary
14 Judgment (Doc. #20), filed on April 11, 2008. Plaintiff filed an Opposition (Doc. #28) and
15 a Statement of Facts in Support of Her Response (Doc. #29) on May 14, 2008. Defendant
16 filed a Reply (Doc. #32) on May 29, 2008. The Court held a hearing on this matter on July
17 14, 2008.

18 **I. BACKGROUND**

19 Plaintiff Anna Vallee Swan was terminated from her position at Defendant Bank
20 of America and brings suit for age discrimination and interference with her rights under the
21 Family and Medical Leave Act ("FMLA"). Plaintiff began working for Valley Bank, a
22 predecessor-in-interest to Defendant, in January 1989 as a peak time teller. (Mot. for
23 Summ. J., Ex. A, Dep. of Anna Vallee Swan ["Swan Dep."] at 35-36.) Shortly thereafter,
24 she became a Customer Service Manager, a position that was later named "Assistant
25 Banking Center Manger," or "ABCM." (*Id.* at 26, 36.) During her tenure with Defendant,
26 Plaintiff worked at various bank branches, most recently at the Paradise Valley branch.

1 (Id.) As an ABCM, Plaintiff was responsible for the branch's day-to-day operations, such
2 as managing the schedule of the staff, operational compliance, and assisting
3 customers. (Mot. for Summ. J., Ex. B, Decl. of Thomas J. Nubel ["Nubel Decl."] ¶ 10.)
4 From 2000 through the time of Plaintiff's termination, the Consumer Market Executive for
5 the region including Plaintiff's branch was Scott Malone ("Malone") and the Consumer
6 Market Manager was Thomas Nubel ("Nubel"). (Id. ¶¶ 5-9.)

7 Plaintiff's first disciplinary incident occurred in June 1990, when Plaintiff was
8 issued a Special Evaluation Report due to an unacceptable balancing rating. (Id.) The
9 Report included a thirty day warning indicating that if she did not bring her balancing up to
10 acceptable standards, she could be put on probation or terminated. (Mot. for Summ. J., Ex.
11 A, Attach. 4.) Plaintiff received a second Special Evaluation Report in April 1992, and was
12 again put on thirty day probation for a "serious breach" in failing to adhere to policies and
13 procedures while balancing the vault. (Id.; Swan Dep. at 65.)

14 Plaintiff's 1999 performance evaluation indicated her "losses need work." (Mot.
15 for Summ. J., Ex. A, Attach. 6.) Plaintiff's annual evaluation for 2000 rated her
16 performance as "meeting goals." (Id., Ex. A, Attach. 7.) This rating represented an average
17 of the four quarters, some of which had a "Met Some, Not All" rating, and others of which
18 had an "Exceeds" rating. (Id.) The evaluation noted she needed to improve service and
19 losses. (Id.) The review also indicated she "needed to be at meets or better" in her next
20 review or she may be terminated. (Id.)

21 Plaintiff began working at the Paradise Valley Branch in August 2004. (Opp'n,
22 Ex. 1, Decl. of Anna Vallee Swan ["Swan Decl."] ¶ 15.) In late 2004, the bank
23 implemented new policies which changed the structure of Plaintiff's position. (Id. ¶ 24;
24 Swan Dep. at 39-41; Nubel Decl. ¶ 13.) The new business model required Plaintiff to spend
25 twenty hours per week in the lobby interacting with customers and supervising the tellers.
26 (Swan Dep. at 41.) The remaining twenty hours were supposed to be spent working with

1 tellers and on audit functions. (Id. at 40.) Previously, Plaintiff's position involved spending
2 more time with tellers and dealing with customers on a one-on-one basis. (Id. at 40.)

3 Defendant claims Plaintiff was resistant to these changes and consequently her
4 performance began to suffer. (Nubel Decl. ¶ 14.) Plaintiff felt she performed better in
5 areas of auditing and training tellers rather than the "lobby leadership" function. (Swan
6 Dep. at 43-44.) She preferred auditing functions and working with the tellers to the lobby
7 functions. (Swan Decl. ¶ 25.) However, she denies she was resistant to the change. (Swan
8 Dep. at 43-44.) Still, she stated she believed it was not appropriate for her to spend more
9 than the required twenty hours in the lobby. (Swan Decl. ¶ 25.)

10 Plaintiff claims she began to experience age discrimination in December 2004.
11 (Swan Dep. at 58, 64.) When Malone visited the branch and found Plaintiff was working
12 behind the teller line rather than in the lobby, he told her that "we don't do it this old way
13 anymore. You have to get out front . . . It's the new way." (Swan Dep. at 51.) This
14 occurred several times. (Id. at 52.) Plaintiff replied, "I'm not an old dog that can't learn
15 new tricks." (Id.) Malone did not respond to Plaintiff's comments. (Id.)

16 In February 2005, Plaintiff was issued an "Action Plan," which stated that she
17 needed to "demonstrate immediate and sustained improvement" in several areas, such as
18 scheduling, effective management of tellers, and lobby management. (Mot. for Summ. J.,
19 Ex. A, Attach. 8.) The Action Plan further stated that Plaintiff had "not performed at the
20 level expected to be successful in [her] job." (Id.)

21 The bank conducted an unofficial audit of the Paradise Valley branch in early
22 June 2005. (Nubel Decl. ¶ 17.) The audit indicated several operational problems, and had
23 it been an official audit, the branch would not have passed. (Id. ¶¶ 17-18.) A majority of
24 the problem areas related to functions for which Plaintiff was responsible. (Id. ¶ 18.) An
25 unofficial audit does not "count" against the branch, but is used as a tool to identify
26 deficiencies and correct problems. (Swan Decl. ¶ 46.)

1 Immediately after the unofficial audit, Plaintiff was issued written counseling
2 concerning her performance. (Id. ¶ 47; Mot. for Summ. J., Ex. A, Attach. 9.) The notice
3 indicates the bank had a number of operational problems, and eighteen of twenty of the
4 problems were within Plaintiff's areas of responsibility. (Id.) The notice stated that failure
5 to meet the expectations outlined could result in further disciplinary action up to and
6 including termination. (Id.)

7 Plaintiff arranged to take six weeks of FMLA leave to have surgery on her foot in
8 July 2005. (Swan Dep. at 97.) Because she was not ready to return in six weeks, she took
9 an additional three weeks of leave. (Id.) Her leave began on July 8, 2005 and she returned
10 to work on September 9, 2005. (Id. at 98; Swan Decl. ¶ 51.)

11 While Plaintiff was out on leave, she contacted a district manager and human
12 resources employee for Bank of America in Austin, Texas to inquire about transferring to
13 an Austin branch. (Id. at 111.) When Plaintiff followed up by contacting the human
14 resources employee by phone, the employee told Plaintiff she could not transfer because she
15 was on final written warning status in her current position. (Id. at 113.) Brandi Martin
16 ("Martin"), the Banking Center Manager at the Paradise Valley branch, communicated
17 Plaintiff's written warning status to a Texas human resources employee in response to the
18 Texas employee's request for information. (Id.)

19 Plaintiff's 2005 second quarter performance assessment, issued in October 2005,
20 indicated her composite rating in the "results" area "met expectations." (Id., Ex. A, Attach.
21 10.) Plaintiff passed by four-tenths of a point. (Swan Decl. ¶ 49.) In another area, her
22 composite rating was "does not meet expectations" and in six out of seven sections, she was
23 given a score of "does not meet expectations." (Id.; Mot. for Summ. J., Ex. A, Attach. 10.)

24 In November 2005, Nubel began making "structured coaching visits" to the
25 Paradise Valley branch to observe and coach. (Nubel Decl. ¶ 22.) He made seven such
26 visits between November 3, 2005 and December 30, 2005. (Mot. for Summ. J., Ex. B,

1 Attach. 3.) Nubel noted there were problems in areas for which Plaintiff was responsible.
2 (Nubel Decl. ¶ 22.) On November 7, 2005, the bank conducted an official audit of the
3 Paradise Valley branch, and the branch earned a passing score. (Swan Decl. ¶¶ 56, 58.)

4 In mid-November, Nubel met with Plaintiff and her immediate supervisor about
5 Plaintiff's performance. (Id. ¶ 24.) According to Nubel, Plaintiff was resistant to coaching
6 and was condescending and defensive during the meeting. (Id.) Plaintiff states she was
7 "confused and angry." (Swan Decl. ¶ 59.) The areas addressed in this meeting included
8 many of the same areas address in the February 2005 action plan. (Nubel Decl. ¶ 24;
9 compare Mot. for Summ. J., Ex. A, Attach. 8 with Ex. B, Attach. 4.) Nubel directed that a
10 written warning be issued to Plaintiff. (Nubel Decl. ¶ 24.) The warning, which Nubel
11 signed, was issued on November 29, 2005. (Mot. for Summ. J., Ex. B, Attach. 4.) It listed
12 a number of areas of poor performance, such as demeanor, scheduling tellers, reporting
13 hours correctly, and managerial issues. (Id.) It also required Plaintiff to plan schedules on
14 a monthly basis, provide her managers with various reports, and meet other guidelines.
15 (Id.) The warning noted that "quick checks" would be performed to assess progress. (Id.)
16 Finally, it noted that failure to perform these actions could result in further discipline or
17 termination. (Id.) Plaintiff read, but refused to sign the warning. (Id.) According to
18 Nubel, Plaintiff did not meet the requirements outlined in the November 2005 warning.
19 (Nubel Decl. ¶ 26.) Nubel informed Plaintiff of her termination on December 30, 2005.
20 (Id. ¶ 27.)

21 Plaintiff filed a complaint with the Equal Employment Opportunity Commission
22 ("EEOC") and the Nevada Equal Rights Commission ("NERC") on June 27, 2006. (Swan
23 Decl. ¶ 70.) She filed suit in this Court on February 20, 2007 against Bank of America for
24 claims of age discrimination in violation of the Age Discrimination in Employment Act
25 ("ADEA") (count one), retaliatory discharge in violation of the ADEA (count two),
26 discrimination and wrongful termination in violation of the FMLA (count three), retaliatory

1 discharge in violation of the FMLA (count four), age discrimination in violation of Nevada
 2 state law (count five), and slander (count six). Defendant Bank of America now moves for
 3 summary judgment, arguing Plaintiff has not demonstrated the existence of a genuine issue
 4 of material fact on a myriad of issues and has not offered admissible evidence in support of
 5 her contentions. Plaintiff responds that the evidence supports her claims.

6 **II. LEGAL STANDARD**

7 Summary judgment is appropriate if “the pleadings, depositions, answers to
 8 interrogatories, and admissions on file, together with the affidavits, if any” demonstrate
 9 “there is no genuine issue as to any material fact and . . . the moving party is entitled to a
 10 judgment as a matter of law.” Fed. R. Civ. P. 56(c). The substantive law defines which
 11 facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). “Only
 12 disputes over facts that might affect the outcome of the suit under the governing law will
 13 properly preclude the entry of summary judgment. Factual disputes that are irrelevant or
 14 unnecessary will not be counted.” Id. A dispute over a material fact is “genuine” if “the
 15 evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id.
 16 Where a party fails to offer evidence sufficient to establish an element essential to its case,
 17 no genuine issue of material fact can exist, because “a complete failure of proof concerning
 18 an essential element of the nonmoving party’s case necessarily renders all other facts
 19 immaterial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

20 The party moving for summary judgment bears the initial burden of showing the
 21 absence of a genuine issue of material fact. Fairbank v. Wunderman Cato Johnson, 212
 22 F.3d 528, 531 (9th Cir. 2000). The burden then shifts to the non-moving party to go beyond
 23 the pleadings and set forth specific facts demonstrating there is a genuine issue for trial. Id.;
 24 Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 997 (9th Cir. 2001). All justifiable inferences
 25 must be viewed in the light most favorable to the non-moving party. County of Tuolumne
 26 v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001).

III. DISCUSSION

A. Discrimination in Violation of the ADEA (Count One)

Defendant argues Plaintiff's ADEA claim is not timely because more than ninety days elapsed between the presumed date she received her right to sue letter and the date she filed this suit. Defendant further argues Plaintiff has not established a prima facie case of discrimination or provided evidence of pretext. Plaintiff responds she filed suit within ninety days of actual receipt of the notice. Plaintiff also argues the evidence supports an inference of discrimination. Because the Court determines that Defendant is entitled to summary judgment based on the merits of Plaintiff's case, as addressed below, the Court need not address whether the claim is time barred.

The ADEA prohibits employers from failing or refusing to hire, discharging, or otherwise discriminating against any individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). The ADEA protects all persons over age forty. *Id.* § 631(a). ADEA claims based on circumstantial evidence use the burden shifting framework laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06 (1973). *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008). Thus, the proof structure in an ADEA case is the same as that of Title VII. *Pejic v. Hughes Helicopters, Inc.*, 840 F.2d 667, 674 (9th Cir. 1988).

1. Prima Facie Case

The plaintiff carries the initial burden of establishing a prima facie case of age discrimination. *Diaz*, 521 F.3d at 1207. If the plaintiff "has justified a presumption of discrimination," the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for its adverse employment action. *Id.* Finally, the burden shifts back to the plaintiff to show the employer's reason was pretextual. *Id.* The plaintiff has the "ultimate burden of proving that age was a 'determining factor' in the employer's alleged

1 unlawful conduct.” Pejic, 840 F.2d at 674.

2 A plaintiff can establish a prima facie case of age discrimination by
3 demonstrating she was “(1) at least forty years old, (2) performing [her] job satisfactorily,
4 (3) discharged, and (4) either replaced by substantially younger employees with equal or
5 inferior qualifications or discharged under circumstances otherwise giving rise to an
6 inference of age discrimination.” Diaz, 521 F.3d at 1207. The requisite degree of proof
7 necessary to establish a prima facie case is minimal on summary judgment and does not
8 need to meet a preponderance of the evidence standard. Coghlan v. Am. Seafoods Co., 413
9 F.3d 1090, 1094 (9th Cir. 2005).

10 To satisfy the second element of her prima facie case, a plaintiff must show she
11 was performing her job satisfactorily. To establish this element, a plaintiff must “produce
12 substantial evidence of satisfactory job performance sufficient to create a jury question on
13 this issue.” Douglas v. Anderson, 656 F.2d 528, 533 n.5 (9th Cir. 1981). For instance, a
14 plaintiff who showed he “generally performed dependably and without incident” and had
15 relatively few and minor deficiencies met this burden. Diaz, 521 F.3d at 1208. In contrast,
16 a plaintiff who violates company policy and fails to improve performance despite warnings
17 has not demonstrated satisfactory performance. Diaz, 521 F.3d at 1208. An employer’s
18 production of significant rebuttal evidence does not necessarily preclude a finding that the
19 Plaintiff met her burden of producing substantial evidence satisfactory job performance for
20 the purposes of her prima facie case. Douglas, 656 F.2d at 533 n.5. Finally, “an employee
21 can satisfy the last element of the prima facie case only by providing evidence that . . . she
22 was replaced by a substantially younger employee with equal or inferior qualifications.”
23 Diaz, 521 F.3d at 1207-08 n.2.

24 Plaintiff meets the first element of a prima facie case because she was over age
25 forty at the time of her termination. (Swan Decl. ¶ 3.) Likewise, she was discharged, which
26 satisfies the third element. Remaining at issue are the second and fourth elements.

1 The only evidence Plaintiff offers to show her job performance was satisfactory
2 is her own declaration that she was doing a satisfactory job, receiving bonuses, and
3 achieving improved customer service scores. While it is doubtful Plaintiff's general
4 statements that she received bonuses constitute "substantial evidence," the Court will
5 assume Plaintiff has presented a prima facie showing of satisfactory job performance.

6 Regarding the final element, the parties do not dispute that Plaintiff's
7 replacement was substantially younger than Plaintiff. However, the only evidence Plaintiff
8 offers to demonstrate her replacement had equal or inferior qualifications is Plaintiff's
9 statement that her replacement speaks Spanish and had served as an ABCM for
10 approximately eighteen months at the time she replaced Plaintiff, which is less ABCM
11 experience than Plaintiff had when she started in that branch. Plaintiff provides no
12 evidence concerning what prior relevant experience or education the replacement has or
13 lacks. Moreover, Plaintiff does not compare her replacement's qualifications with her own,
14 except for the length of time each spent as an ABCM. Plaintiff fails to raise a genuine issue
15 of material fact concerning her replacement's equal or inferior qualifications. Plaintiff
16 therefore has failed to establish a prima facie case of age discrimination.

17 **2. Defendants' Burden**

18 If a plaintiff makes out a prima facie case, the burden shifts to the defendant to
19 offer a legitimate, non-discriminatory reason for the employment action. This requires the
20 employer only to set forth a legally sufficient explanation for rejecting the plaintiff. Lowe
21 v. City of Monrovia, 775 F.2d 998, 1007 (9th Cir. 1985). This burden is "one of
22 production, not persuasion, thereby involving no credibility assessment." Lindsey v. SLT
23 Los Angeles, LLC, 447 F.3d 1138, 1148-49 (9th Cir. 2006) (citing Reeves v. Sanderson
24 Plumbing Prods., Inc., 530 U.S. 133, 142 (2000)).

25 Defendant has provided evidence demonstrating poor performance was the
26 reason for Plaintiff's termination. Defendant has offered copies of performance reviews,

1 warnings, and a declaration by one of Plaintiff's supervisors. Defendant put forth an
2 explanation, which if true, is a legally sufficient non-discriminatory reason for Plaintiff's
3 termination. Defendant therefore has met its burden.

4 **c. Plaintiff's Evidence of Pretext**

5 If the employer articulates a legitimate, nondiscriminatory reason for the
6 challenged action, the "presumption of unlawful discrimination simply drops out of the
7 picture." Coleman v. Quaker Oats Co., 232 F.3d 1271, 1282 (9th Cir. 2000). The burden
8 then shifts "back to the plaintiff to raise a genuine factual question as to whether the
9 proffered reason is pretextual." Lowe, 775 F.2d at 1008; see also Villiarimo v. Aloha
10 Island Air, Inc., 281 F.3d 1054, 1062 (9th Cir. 2002). A plaintiff may use circumstantial
11 evidence to show pretext, but the evidence must be "specific and substantial." Id. (citing
12 Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998)).

13 "[T]he establishment of a prima facie case based on the minimum evidence
14 necessary to raise a presumption of discrimination does not preclude summary judgment."
15 See Coleman, 232 F.3d at 1282. Summary judgment is appropriate when evidence to refute
16 the defendant's legitimate explanation is lacking. Lindsey, 447 F.3d at 1148. Moreover, a
17 plaintiff cannot survive summary judgment by "simply restating the prima facie case and
18 expressing an intent to challenge the credibility of the employer's witnesses." Lindahl v.
19 Air France, 930 F.2d 1434, 1437-38 (9th Cir. 1991). Rather, a plaintiff must "produce
20 specific facts directly evidencing a discriminatory motive or showing that the employer's
21 explanation is not credible." Id. at 1438. A mere refutation of the employer's legitimate
22 reason is insufficient. Little v. Windermere Relocation, Inc., 301 F.3d 958, 969 (9th Cir.
23 2002).

24 Because Plaintiff does not offer any direct evidence of Defendant's
25 discriminatory intent, she must present specific and substantial evidence of intentional
26 discrimination. Plaintiff must demonstrate Defendant's proffered reason for termination is

1 pretextual and that age was the determining factor in Defendant's conduct.

2 Plaintiff argues the disciplinary write-ups she received were disingenuous and
3 whether the bank managers believed Plaintiff's performance was deficient is a question of
4 fact. However, Plaintiff offers no specific reasons to distrust the managers' evaluations.
5 Plaintiff may demonstrate pretext by showing Defendant's explanation is unworthy of
6 credence, but she does not explain why Defendant's explanation should be disbelieved.
7 Additionally, an intent to challenge the employer's witnesses, which is akin to Plaintiff's
8 challenging the sincerity of the write-ups, is not sufficient to show pretext.

9 Moreover, Plaintiff testified she had no reason to believe Nubel wanted to
10 terminate her because of her age. (Swan Dep. at 96.) She also claimed she believed he did
11 not want to terminate her because of her age, but did nonetheless. (Swan Decl. ¶ 67.)
12 Plaintiff offers no basis for the conclusion that Nubel or any other employee of Defendant
13 terminated her because of her age. Because Plaintiff presents no evidence beyond her own
14 unsupported belief that age was a motive for Plaintiff's termination, Plaintiff has not
15 established a prima facie case and has not offered specific and substantial evidence of
16 pretext. The Court therefore will grant summary judgment in favor of Defendant on
17 Plaintiff's ADEA claim.

18 **B. Age Discrimination Under Nevada State Law (Count Five)**

19 Plaintiff alleges Defendant violated Nevada Revised Statute § 613.310 et seq. on
20 the same basis Defendant violated the ADEA. Defendant argues it is entitled to summary
21 judgment on this claim for the same reasons as it is under the ADEA claim. Defendant
22 argues Plaintiff violated the Nevada statute of limitations because Plaintiff filed suit later
23 than the 180 days the Nevada statute permits. Plaintiff responds she filed her claim within
24 180 days, though she had 300 days to file her claim.¹

25 ¹ Plaintiff's claim she had 300 days is incorrect. Plaintiff inappropriately relies on a case
26 concerning the timeliness of filing a Title VII complaint with the EEOC: Laquaglia v. Rio Hotel &

1 The relevant statute of limitations mandates that “[n]o action . . . may be brought
2 more than 180 days after the date of the act complained of. When a complaint is filed with
3 the Nevada equal rights commission the limitations provided by this section is tolled . . .
4 during the pendency of the complaint before the commission.” Nev. Rev. Stat. § 613.430.

5 Plaintiff was terminated on December 30, 2005. That date, therefore, represents
6 the latest act of alleged age discrimination. She filed a complaint with NERC on June 27,
7 2006, which is 178 days from December 30, 2005. Taking Plaintiff’s declaration as true,
8 she received her right to sue letter on November 24, 2006. She filed suit in this Court on
9 February 20, 2007. Because nearly 180 days elapsed by the time she filed her NERC
10 complaint, and approximately another ninety days elapsed between receiving her letter and
11 filing suit, she exceeded the 180 day time limit. Even excluding the tolling of the
12 limitations period from June 27, 2006 to November 24, 2006, Plaintiff exceeded 180 days
13 between the employer action and filing her suit in this Court. Section 613.430 therefore
14 bars her claim under Nevada law. The Court will grant summary judgment in Defendant’s
15 favor on this claim.

16 **C. Retaliatory Discharge in Violation of the ADEA (Count Two)**

17 Plaintiff brings a retaliation claim, alleging Defendant retaliated against her for
18 complaining about age discrimination. Defendant argues it is entitled to summary judgment
19 because Plaintiff did not exhaust her administrative remedies with respect to this claim. At
20 the hearing, Plaintiff conceded she did not exhaust this claim and Defendant is entitled to
21 summary judgment. The Court therefore will grant summary judgment in Defendant’s
22 favor on this claim.

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25 Casino, Inc., 186 F.3d 1172, 1174 (1999). In that case, the Court held that the plaintiff’s Title VII
26 claim was timely filed with the EEOC because in certain circumstances a plaintiff has 300 days to file
a claim with the EEOC. Id. at 1173. However, the Court explicitly noted the Nevada state law claim
was time-barred for exceeding the state limitations period of 180 days. Id.

1 **D. FMLA Interference and Retaliation (Counts Three and Four)**

2 Defendant argues it is entitled to summary judgment on Plaintiff's FMLA claims
3 because Plaintiff has provided insufficient evidence to establish a causal connection
4 between her FMLA leave and her termination. Defendant also argues Plaintiff does not
5 have a separate anti-retaliation claim because Plaintiff's claim is based on alleged
6 punishment for taking leave, not for opposition to unlawful employment practices, or other
7 protected activity. In response, Plaintiff argues her termination closely followed her FMLA
8 leave. Plaintiff does not acknowledge the distinction between the two types of claims and
9 addresses only the interference claim.

10 An interference with FMLA rights case concerns situations in which an employee
11 is subject to negative consequences for using FMLA leave. Xin Liu v. Amway Corp., 347
12 F.3d 1125, 1136 (9th Cir. 2003); 29 U.S.C. § 2615(a)(1). In contrast, an anti-retaliation
13 case under the FMLA concerns employees who are punished for opposing unlawful
14 practices. Xin Liu, 347 F.3d at 1136; 29 U.S.C. § 2615(a)(2).

15 Title 29 U.S.C. § 2615(a)(1) provides, "It shall be unlawful for any employer to
16 interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided
17 under this subchapter." Interference includes employer actions that deter employees'
18 participation or attach negative consequences to taking leave. Bachelder v. Am. West
19 Airlines, Inc., 259 F.3d 1112, 1124 (9th Cir. 2001). To establish an interference case, a
20 plaintiff must demonstrate that her taking FMLA leave constituted a "negative factor" in the
21 decision to terminate her. Bachelder v. Am. West Airlines, Inc., 259 F.3d at 1125 (citing
22 C.F.R. § 825.220). The McDonnell Douglas burden shifting framework does not apply to
23 FMLA interference cases. Xin Liu, 347 F.3d at 1136.

24 Close temporal proximity between the leave and termination may support a
25 causal connection between those events. Id. However, while mere temporal proximity may
26 support an inference of causation, the proximity must be "very close," such as several days

1 rather than several months. Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273 (2001)
2 (analyzing whether a plaintiff established a prima facie case in the context of Title VII
3 retaliation). See also Hite v. Vermeer Mfg. Co., 446 F.3d 858, 866 (8th Cir. 2006) (holding
4 temporal proximity must be “very close” to create inference of causation in context of
5 FMLA interference); Arban v. West Pub. Corp., 345 F.3d 390, 403 (6th Cir. 2003) (holding
6 mere temporal proximity is insufficient to demonstrate pretext in the context of a plaintiff’s
7 termination after taking FMLA leave); King v. Preferred Tech. Group, 166 F.3d 887, 893
8 (7th Cir. 1999) (holding close proximity is sufficient to establish a prima facie case of
9 FMLA retaliation if the action took place “on the heels of” the activity).

10 Plaintiff argues her disciplinary incidents temporally corresponded with her
11 giving notice of and taking FMLA leave. Plaintiff claims she was disciplined close in time
12 to giving Defendant informal notice of her intent to take leave, but does not indicate when
13 she gave the informal notice, or how close in time it was to the write-ups. Plaintiff states
14 only that she received a write up “after” giving informal notice of her anticipated need to
15 take leave. (Swan Decl. ¶ 38.) Additionally, almost four months elapsed between her
16 return from leave and her termination. Other than temporal proximity, Plaintiff offers no
17 evidence of a causal connection between her FMLA and her write-ups and termination.

18 Absent other evidence, Plaintiff’s termination four months after Plaintiff returned
19 from leave does not support an inference that FMLA leave was a negative factor in
20 Defendant’s decision to terminate her. Because Plaintiff does not raise a genuine issue of
21 material fact as to whether FMLA leave was a negative factor in Defendant’s employment
22 decisions concerning Plaintiff, Defendant is entitled to summary judgment on the FMLA
23 interference claim. Additionally, Plaintiff does not plead facts alleging a retaliation claim
24 under FMLA, she does not offer evidence supporting this claim, and does not address
25 Defendant’s arguments regarding this claim in her Opposition. The Court therefore will
26 grant Defendant’s motion for summary judgment on the retaliation claim.

1 **E. Slander (Count Six)**

2 Plaintiff's slander claim is based on Martin informing a bank human resources
3 employee that Plaintiff was on "final written warning" status, which negatively affected
4 Plaintiff's ability to transfer to another branch. Plaintiff alleges this statement was false
5 because her written warning status was not "final." Defendant argues it is entitled to
6 summary judgment because the statement was not false, Plaintiff has not demonstrated
7 fault, and the statement is protected by intra-corporate privilege. Plaintiff responds that her
8 write-ups were part of a campaign to get rid of her, were false, and made in bad faith.
9 Defendant replies that it addressed the cause of action pled in the Complaint, Plaintiff
10 improperly responded with a new basis for liability without responding to the original one,
11 and therefore Defendant is entitled to summary judgment under Federal Rule of Civil
12 Procedure 56(e)(2).

13 **1. Prima Facie Case**

14 To establish a prima facie case of defamation, in this case slander, a plaintiff
15 must prove: "(1) a false and defamatory statement by defendant concerning the plaintiff; (2)
16 an unprivileged publication to a third person; (3) fault, amounting to at least negligence;
17 and (4) actual or presumed damages." Simpson v. Mars, Inc., 929 P.2d 966, 967 (Nev.
18 1997). A statement is not defamatory if it is true or substantially true. Pegasus v. Reno
19 Newspapers, Inc., 57 P.3d 82, 88 (Nev. 2002).

20 Plaintiff had been issued a written warning indicating that failure to meet
21 expectations could result in further disciplinary action including termination. Plaintiff has
22 not offered evidence to refute Defendant's contention that this constituted "final written
23 warning" status. Plaintiff did not respond to Defendant's argument that the relevant
24 statement was true or at least substantially true, or provide evidence to controvert
25 Defendant's statement. Thus, Plaintiff has failed to raise a genuine issue of material fact as
26 to the statement's falsity. Plaintiff therefore has failed to establish a prima facie case of

1 slander.

2 **2. Privilege**

3 Certain intra-corporate communications are privileged. Pope v. Motel 6, 114
 4 P.3d 277, 284 (Nev. 2005). Privileges are defenses, and not part of the prima facie case.
 5 Pope, 114 P.3d at 284. Defendant corporations therefore have the burden of alleging and
 6 proving the privilege's existence. Id. To be privileged, the communication must be made
 7 in the regular course of the corporation's business. Id. A privilege exists where a
 8 defamatory statement "is made in good faith on any subject matter in which the person
 9 communicating has an interest, or in reference to which he has a right or duty, if it is made
 10 to a person with a corresponding interest or duty." Circus Circus Hotels, Inc. v.
 11 Witherspoon, 657 P.2d 101, 105 (Nev. 1983). Whether such a privilege exists is a question
 12 of law. Id. If a defendant establishes a privilege, the burden shifts to the plaintiff to show
 13 the defendant abused it by publishing the communication with malice, including bad faith
 14 or ill will. Id. The question may go to a jury only if the plaintiff presents sufficient
 15 evidence for the jury reasonably to infer malice. Id. Statements made in the course of a
 16 background investigation of an employee is subject to this conditional privilege. Bank of
 17 Am. Nev. v. Bourdeau, 982 P.2d 474, 476 (Nev. 1999).

18 Defendant offered evidence supporting its claim of intra-corporate
 19 communication privilege. It was within Martin's duties as a Banking Center Manager to
 20 respond to inquiries about transfers concerning employees at the Paradise Valley Branch.
 21 (Nubel Decl. ¶ 31.) Martin made the statement to a fellow bank employee inquiring about
 22 Plaintiff for the purposes of employment. Thus, the statement was made between two bank
 23 employees, in the course of investigating Plaintiff as a potential employee of another
 24 branch. Discussing employee performance and status is in the course of the human
 25 resources employees' regular course of business. Plaintiff has provided no evidence to
 26 demonstrate such a communication was not in Martin's regular course of business, or show

1 the privilege was abused. She states that Defendant lacked good faith, but offers no
2 evidence to support that allegation. Defendant has demonstrated a privilege, and Plaintiff
3 has not offered evidence Defendant abused the privilege, or from which a jury could
4 reasonably infer malice. Defendant established the defense of privilege.

5 **3. Disciplinary Write-Ups as Slander**

6 In her Opposition, Plaintiff changed the factual basis of her claim from Martin's
7 statement to the content of Plaintiff's disciplinary write-ups, arguing the write-ups were
8 disingenuous and therefore constitute slander. Federal Rule of Civil Procedure 8(a)
9 requires that plaintiffs provide "a short and plain statement of the claim showing that the
10 pleader is entitled to relief." A plaintiff must give the defendant "fair notice of what the
11 plaintiff's claim is and the grounds upon which it rests." Swierkiewicz v. Sorema N.A., 534
12 U.S. 506, 512 (2002). Though federal pleading is notice pleading, the plaintiff still must
13 present a definite issue for adjudication. Ideal Elec. Co. v. Flowserve Corp., 357 F. Supp.
14 2d 1248, 1253 (D. Nev. 2005). A plaintiff who does not allege facts sufficient to place the
15 defendant on notice of a particular basis for a claim may not proceed with an argument
16 raised in a responsive pleading at the summary judgment stage. See id.; see also Coleman
17 v. Quaker Oats Co., 232 F.3d 1271, 1294 (9th Cir. 2000).

18 Plaintiff may not change the basis of her claim at the summary judgment stage.
19 In any event, Plaintiff has not indicated how the write-ups were false, or to whom they were
20 published. If the Court were to consider the changed factual basis of her claim, she has not
21 established a prima facie case of slander.

22 Regarding Martin's statement to the Texas human resources employee, Plaintiff
23 has not raised a genuine issue of fact as to whether Defendant's statements were false, or
24 not substantially true. Additionally, Defendant has established the statement was
25 privileged, and Plaintiff has not refuted the privilege, or offered any basis to show
26 Defendant abused the privilege. Likewise, even if the Court were to consider the write-ups

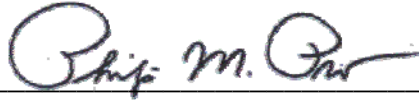
1 as the basis for Plaintiff's slander claim, Plaintiff does not establish a prima facie case. The
2 Court therefore will grant summary judgment in favor of Defendant on Plaintiff's slander
3 claim.

4 **IV. CONCLUSION**

5 IT IS THEREFORE ORDERED that Defendant Bank of America's Motion for
6 Summary Judgment (Doc. #20) is hereby GRANTED.

7 Judgment is hereby entered in favor of Defendant and against Plaintiff.

8 DATED: July 22, 2008.

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11 PHILIP M. PRO
12 United States District Judge
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